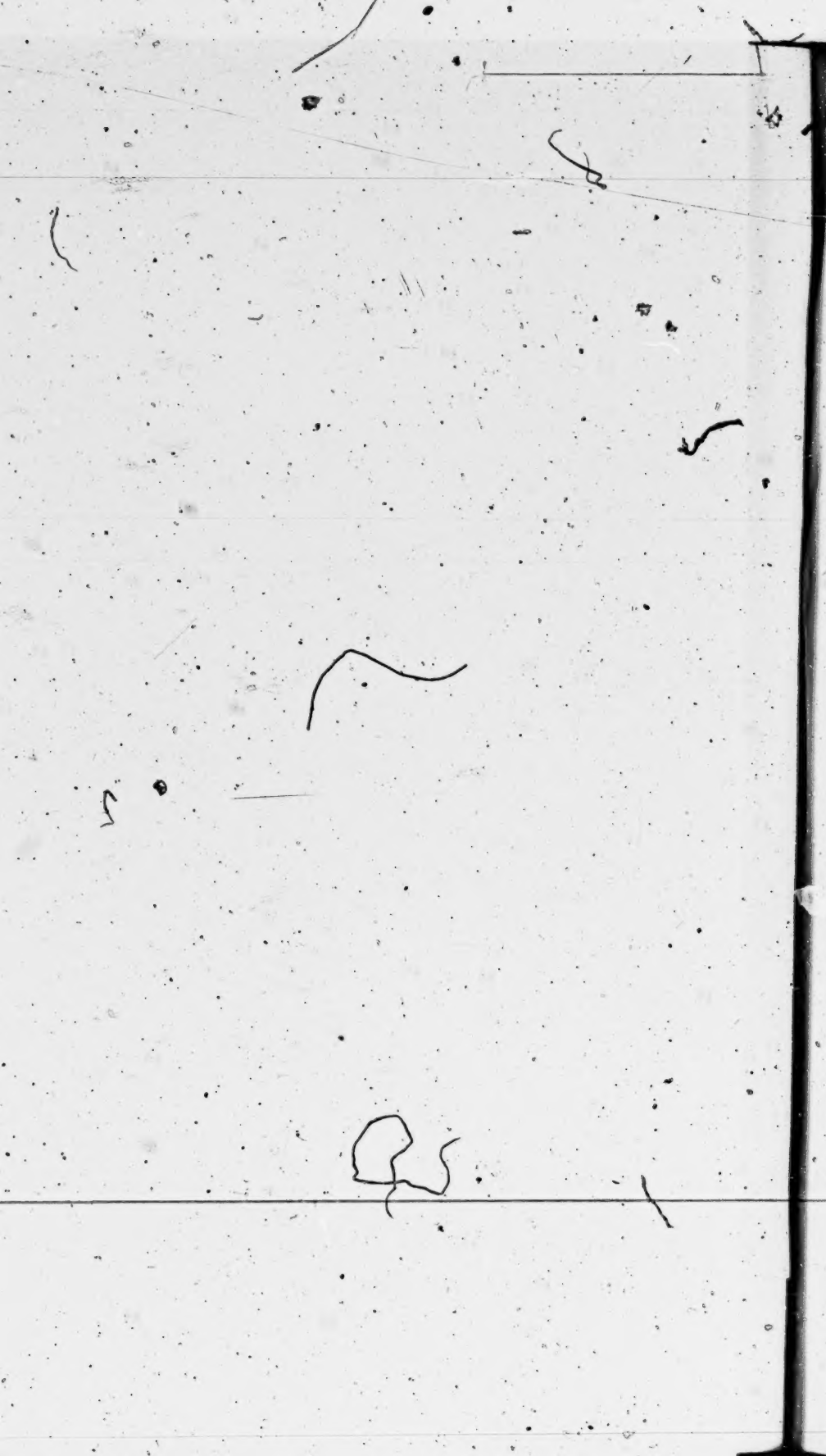

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NEIBELL,
W. W. PRYOR,
Counsel for Petitioner.

C. MAURICE WEIDEMEYER,
Of Counsel.

INDEX.

Subject Index.

Citations.

Cases:

Statutes and Treaties:

Miscellaneous:

SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled cause on January 6, 1941 (R. 8-39).

Opinions Below.

The opinions of the Court of Claims are not as yet reported (R. 8-39, 39-42).

Jurisdiction.

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). Motion for a new trial filed in the proceedings was allowed as to certain items of the

claim and overruled as to other items on May 5, 1941 (R. 39-43). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Jud. Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
>
> * * * * * * *
>
> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, * * * * "

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended

petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of sub-

stantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

In order to avoid repetition the provisions of the treaties and statutes involved in the several items of the claim will be set forth in the discussion of said items.

Questions Presented.

The questions presented are as follows:

1. Whether an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress, by subsequent legislation, provides that payments be otherwise made; and whether the United States is liable to the tribe for the balance of any moneys not so disbursed and expended.

2. Whether the Secretary of the Interior has plenary power over the funds of an Indian tribe, and can disburse tribal funds without the authority of Congress, and in contravention of the express prohibition by Congress against such disbursement.

3. Whether Congress by Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502) prohibited payments of tribal moneys to the tribal officers of the Five Civilized Tribes; and if so, whether the Secretary of the Interior was required to comply with this provision of law.

4. Whether the United States has the burden of proving affirmatively its gratuity offsets under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

5. Whether amounts disbursed by the United States as administrative expenses and incidental to the fulfillment

of its treaty and agreement obligations to petitioner are gratuity offsets under said Act of August 12, 1935.

Statement.

The Act of May 20, 1924, *supra*, as amended, conferred upon the Court of Claims jurisdiction to adjudicate the legal and equitable claims of the Seminole Nation against the United States growing out of treaties, agreements and acts of Congress relating to Indian Affairs.

On February 24, 1930, the Seminole Nation filed suit under the above act. The trial of the case was delayed some four years for a general accounting of Seminole funds requested by the Government, and this accounting report was filed by the United States in the record of the Court below. On September 19, 1934, the Seminole Nation amended its petition to conform to the facts set forth in said accounting report, and the case was submitted to the Court of Claims on June 4, 1935. On December 2, 1935, the Court rendered a decision on the claims presented in the amended petition awarding judgment for $1,317,087.27 in favor of the Seminole Nation (82 C. Cls. 135).

Upon a review of the above decision, this Court held that the amended petition embodied new claims raised for the first time therein, and, said petition having been filed after the expiration of the limitation for filing suits as fixed in the jurisdictional act, the Court of Claims had no jurisdiction to render the above judgment (*United States* v. *Seminole Nation*, 299 U. S. 417).

The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and a second amended petition was filed on November 8, 1937, limiting the claims therein presented to those found to be meritorious by the lower court in its decision of December 2, 1935. In this second proceeding, after trial upon the merits, the Court of Claims, on January 6, 1941, rendered a decision dismissing

the petition and overruling in many respects its original decision of December 2, 1935. On motion for a new trial, several of the errors of this last decision were corrected by the lower court, and overruled as to others.

As the case now stands there are conflicting views expressed by the lower court upon the same issues, and we are requesting this Court to review the case and clear up the existing confusion.

The claim herein presented is one of accounting, and consists of items falling generally within two classes:

1. Items as to which the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation, and

2. An item as to which payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law, and in contravention of positive directions of Congress forbidding such disbursements.

Items 1 to 4 (class 1) arise and grow out of the treaties of August 7, 1856 (11 Stat. 699) and March 21, 1866 (14 Stat. 755), between the United States and the Seminole Nation of Indians, and numerous acts of Congress which will be referred to and quoted in connection with the particular items of the claim to which they apply.

Item 5 (class 2) arises and grows out of Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495), and involves the construction of said provision of law.

The Act of July 26, 1866, c. 266, 14 Stat. 255, 280, provides in part as follows:

> "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

This provision of law (which became Section 2097 of the Revised Statutes of the United States) applies generally to the claim herein presented.

The particular items of the claim will be outlined briefly below.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States disburse annually for ten years $3,000 for the support of schools; $2,000 for agricultural aid, and $2,200 for the support of smiths and smith shops, a total obligation of $72,000. Congress annually appropriated the amounts to fulfill this treaty obligation during the fiscal years 1857 to 1866, inclusive. However, $10,436.58 only was so disbursed by the officers of the United States, and the balance of $61,563.42 is claimed for the Seminole Nation (R. 11-12).

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, 702, provided for the establishment of a Seminole trust fund of $500,000, and the annual interest thereon of $25,000 was directed to be disbursed annually per capita to the members of the Seminole Nation. Although Congress annually appropriated the amounts to fulfill this treaty obligation from the fiscal years 1867 to 1909, inclusive, yet the officers of the United States failed either to disburse or apply to this treaty object a total of $154,551.28, due for the fiscal years 1867-1874, 1876, 1879, and 1907-1909 (R. 12-13).

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States establish a permanent school fund of $50,000 for the Seminole Nation, and the annual interest of $2,500 on same was directed to be "paid

annually to the support of schools." Although Congress annually appropriated said interest for the fiscal years 1867 to 1909, inclusive, yet a total of $61,347.20 of said interest was not disbursed in accordance with the requirements of said treaty provision (R. 13-14).

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States erect suitable agency buildings on the Seminole reservation "at an expense not exceeding ten thousand ($10,000) dollars." Congress twice appropriated said $10,000 by the Acts of July 28, 1866, c. 296, 14 Stat. 310, 319, and May 18, 1872, c. 172, 17 Stat. 122, 132, but neither of said amounts nor any part thereof, was disbursed for said treaty purpose, though $9,030.15 of the last appropriation was disbursed for some unknown purpose. However, $931.76 was disbursed from general appropriations for agency buildings and repairs within the Seminole Nation, for which the United States has been credited. A balance of $9,068.24 is claimed under this treaty obligation (R. 14-15).

Item 5.

Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502, provided as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

A review of the history of this legislation shows that by the Act of April 15, 1874, c. 97, 18 Stat. 29 (which applied to Treaty of August 7, 1856, funds only), and the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, the Seminole tribal officers were entrusted with the disbursement of certain of the Seminole tribal income. The reports of the Dawes Commission for the years 1894 to 1898 state that the tribal governments of the Five Civilized Tribes were grossly corrupt; that the affairs of these tribes had fallen into the hands of a few energetic mixed-blood Indians and white men who were using the tribal funds to further their own personal interests, and were amassing large fortunes by robbing the other and more ignorant members of the tribe of their share of the tribal estate. Such activities of the Seminole tribal officials had been reported to the executive officers of the United States as early as 1869 (R. 60).

To put a stop to the dissipation of the tribal income of these tribes by the tribal officers, Congress, under the Curtis Act, assumed full administrative control over the property and affairs of the Five Civilized Tribes, directed the allotment of the tribal lands, and the equal division of the funds of said tribes among the members thereof. As a part of this broad comprehensive scheme, said Section 19 forbade the payment of the tribal funds thereafter to the tribal officers on any account whatever for disbursement.

In utter disregard of this express prohibition of Congress, the Secretary of the Interior, during the fiscal years 1899 to 1907, inclusive, continued to pay over to the Seminole tribal officers the Seminole tribal moneys, and thus permitted the robbery of a helpless people to continue until it was stopped finally by an opinion of the Attorney General (26 Op. Attys' Gen. 340). The petitioner claims the sum of $864,702.58 which was disbursed in direct contravention of this positive provision of law (R. 15).

Specification of Errors to be Urged.

As to the affirmative items of petitioner's claim, the lower court erred in holding as its conclusions of law:

1. That an Indian tribe is not entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, and that the United States is not liable to the tribe for the balance not so disbursed or expended.

As to Item 1 particularly—that the United States was authorized by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, to divert for the relief of refugee Indians the amount of $61,663.42 of the total required to be disbursed by the United States for schools, agricultural assistance, and smiths and smith shops under Article 8 of the Treaty of August 7, 1856; and that the release in Article 8 of the Treaty of March 21, 1866, affects the right of the Seminole Nation to recover for this unfulfilled treaty obligation.

As to Item 2 particularly—in finding, contrary to the evidence adduced, that the following amounts appropriated to fulfill Article 8 of the Treaty of August 7, 1856—requiring said moneys appropriated to be disbursed per capita to members of said tribe—were disbursed by the United States for the benefit of the Seminole Nation:

1870	$17,821.00
1871	12,500.00
1872	12,500.09
1873	12,500.00
1874	11,101.64

As to Item 3 particularly—that the United States could disregard the provisions of Article 3 of the Treaty of March 21, 1866, requiring the United States to disburse $2,500 annually for the support of schools within the Seminole Nation, and also in violation of said Section 2097 of the Revised

Statutes of the United States, and thus avoid its responsibility by disbursing moneys other than in accordance with the said provisions of law.

As to Item 4 particularly—that the United States substantially complied with Article 6 of the Treaty of March 21, 1866, requiring it to construct suitable agency buildings on the Seminole reservation at an expense not exceeding $10,000, by a disbursement of $931.76 only for such purpose, after dissipating most of the $10,000 appropriated by Congress to fulfill this treaty obligation and disbursing it for a purpose not shown.

2. Further, the lower court erred in holding that Section 19 of the Curtis Act does not contain a broad and comprehensive prohibition against the payment of any tribal moneys on any account whatever to the tribal officers for disbursement, but that the meaning of said provision is limited to a prohibition against the payment of tribal moneys to the tribal officers for per capita payments only.

As to the counterclaims allowed, the lower court erred in holding and finding:

1. That the United States need not prove affirmatively that the items claimed as gratuity offsets under said Act of August 12, 1935, were disbursed gratuitously and for the benefit of the Seminole Nation before it is entitled to such offsets.

2. That the amounts disbursed by the United States for administrative expenses and as incidental to the performance of its treaty and agreement obligations with the Seminole Nation are gratuity offsets, rather than holding that said expense is to be borne by the United States as necessarily incidental to the performance of its treaty and agreement obligations with petitioner.

3. That the United States is entitled to a gratuity offset for $165,847.17 disbursed by it in purchasing lands of the

Creek Nation for the Seminoles, upon which lands the Seminoles had been erroneously located by the United States and encouraged to make valuable improvements in reliance upon the promise of the United States that if the first survey of the boundaries be found to be in error the United States would protect them in their improvements.

4. That the petitioner is chargeable with any part of the items of Education, Sale of town lots, Sale of town sites, Probate expenses, General Office Expense, Surveying Segregated Coal and Asphalt Lands, and other like items of gratuity offset, without substantial evidence in the record to support such a charge against the petitioner.

5. That petitioner is chargeable with 3.72 per centum of items totaling $11,416,066.55 (Finding 18, R. 19-20) obtained by the use of population figures of the Five Civilized Tribes from 1866 to 1934, rather than a percentage of 3.08 based upon population figures shown by the final rolls of petitioner and the other Five Civilized Tribes made by the Dawes Commission over a period from 1896 to 1907, inclusive, and then only when it is affirmatively shown that petitioner actually received the benefit of such items, and that they were not disbursed in fulfillment of the agreement obligations of the United States owing to petitioner.

Reasons for Granting the Writ.

The reasons for requesting this Court to review this case are set forth as follows:

1. That there is a conflict in the holdings in the two decisions of the lower court on the same issues in this case; and

2. That important and novel questions are presented both in the affirmative case of petitioner and in the offset feature of the case.

In its former opinion the Court of Claims upheld the right of the Seminole Nation to recover on all the items herein presented (82 C. Cls. 135). Upon the review of the case, without passing on the merits of the items herein presented, this Court held that the lower court had no jurisdiction and dismissed the case (299 U. S. 417). The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and on January 6, 1941, the Court of Claims rendered a decision wholly inconsistent with its former decision on the same issues, and dismissed the case. Thus there are two conflicting decisions rendered by the same court on the same issues, creating confusion as to the correct determination of the questions involved, which this Court alone can finally settle.

With respect to the counterclaims we believe that the lower court erred as to many of the items allowed. These gratuity offsets are permitted to be charged against the legal and equitable claims of petitioner under authority of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596. The questions presented under this phase of the case are important and novel, and have not been passed upon by this Court.

The items as to which a conflict of decision exists will be discussed separately below.

The main question with respect to items 1 to 4 is whether the United States is liable for its failure to make payments in the amounts and manner provided by its treaties and agreements with the Seminole Nation, unless otherwise directed by Congress.

The provisions of law chiefly relied upon by petitioner are found in the treaties of August 7, 1856, 11 Stat. 699, and March 21, 1866, 14 Stat. 755. Also the Act of July 26, 1866, c. 266, 14 Stat. 255, 280, which became Section 2097 of the Revised Statutes of the United States, quoted *supra*, p. 6.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Seminole Nation, provided in part that:

> "In consideration of such release, discharge and obligation, * * * The United States do therefore agree and stipulate as follows, viz.: To pay to the Seminoles now west, * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. * * *"

Congress appropriated the money annually to fulfill this obligation, totaling $72,000, but $10,436.58 only was disbursed for the objects specified in the treaty, leaving a balance due petitioner under this obligation of $61,563.42, which is claimed herein.

In its decision of December 2, 1935, the lower court permitted recovery in the amount of $61,563.42, pointing out that the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, providing for the diversion of annuities of the Five Civilized Tribes never became effective, and further that the release in Article 8 of the Treaty of March 21, 1866, had no application to the claim herein presented (82 C. Cls. 135, 146, 147).

However, in its later decision of January 6, 1941, the lower court erroneously held that said Act of July 5, 1862, applied to this treaty obligation, and that the release in the Treaty of March 21, 1866 barred recovery on this claim. We submit that the lower court here failed to give due consideration to the fact that the Act of July 5, 1862, never became effective as to the Five Civilized Tribes. This act is so worded that it does not become operative except "dur-

ing the discretion and pleasure of the President," when the tribes mentioned shall be found to be in actual hostility to the Government of the United States. Upon being urged to act, President Lincoln refused and withheld judgment in the matter (American Indian Under Reconstruction, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E 540.13A22, notes. 496-497, pages 251-252).

Also the lower court failed to give proper consideration to the scope of the release in said Treaty of March 21, 1866. Article 8 of said Treaty of March 21, 1866, provides in part as follows:

> "The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refuget and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm al such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. * * *"

The confirmation of the diversion of annuities was limited to those made "from the funds of the Seminole Nation," and covered claims arising out of the Civil War period. The Seminole Nation had funds to its credit in the United States Treasury at this time, which had been established under the Treaty of August 7, 1856, the interest on which was payable annually per capita. The release clearly applied to this interest, and no claim has been made for such diversions, though the record shows that $249,731.88 of said interest was thus diverted and that but $31,599.68 of said total was disbursed for Seminole Indians (R. 28-29). The claims herein sued upon were for the support of schools, agricultural assistance and smiths and smiths shops, which

were to be paid for from funds of the United States, and not from funds of the Seminole Nation. Furthermore, a large part of this claim was due and owing before the Civil War period and would not be covered by the release which provided for settlement of damages and claims growing out of the Civil War period.

We submit that of the two conflicting decisions the former one is correct as to this item of the claim. In that decision the court stated (82 C. Cls. 135, 147):

> "The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42."

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States invest for the Seminole Nation:

> "* * * the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united

tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity: * * *"

The combined Seminole fund was thereafter set up and interest thereon was paid by Act of March 3, 1859, c. 79, 11 Stat. 409.

Although the interest of $25,000 was annually appropriated by Congress to fulfill this treaty obligation, yet during the period from 1867 to 1909, there was an underpayment of this treaty obligation.

In the first decision the lower court held that petitioner was entitled to recover for underpayments in the amount of $154,551.28. (82 C. Cls. 135, 148-150.) In the second proceeding the court found that the following amounts were not disbursed for the treaty purpose but were nevertheless disbursed for the benefit of the Seminole Nation, and at the request of the Seminole council:

1870	17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

and reduced the amount of recovery to $13,501.10 (R. 25).

The lower court clearly was in error in allowing the above credits for the reason that these amounts admittedly were not disbursed for the purpose named in said treaty. The record herein, which was before the lower court and called to its attention, shows that the amounts of $17,821.00 and $11,101.64 were disbursed in 1870 and 1874, respectively, for payments to individuals purporting to have claims against the Seminole Nation and for payment of drafts on the Seminole Nation. Said Article 8 specifically

guarded the Seminole Nation against such payments as follows:

> "but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

The record shows that the Seminole officials would create claims in favor of themselves by calling councils on any pretext and voting themselves fees, all of which were of no benefit to the Seminole Nation (R. 61, 62-63). In this manner these officials would retain to themselves the tribal annuities to the exclusion of the other members of the tribe. In the face of this record, the lower court in its last opinion allowed the above credits against this treaty obligation.

The purported payments of $12,500 each made in the fiscal years 1871, 1872 and 1873 were disallowed by defendant's own disbursing officers and were *never allowed as proper disbursements against this treaty obligation.* Notwithstanding this fact the lower court allowed such amounts as a credit against said treaty obligation.

The requests of the Seminole council that the United States pay this money to the tribal officers instead of per capita as required by the treaty would furnish no excuse for disregarding this treaty obligation and Section 2097 of the Revised Statutes. These requests of the Seminole officials were denied by the Commissioner of Indian Affairs and the Secretary of the Interior because they were not convinced that the Seminole Indians would get the benefit of this money (R. 61-62). It had been reported to the executive officers of the United States that the Seminole chiefs were stealing this money from the other members of the tribe in the manner above outlined (R. 62-63). Such requests of the Seminole tribal officials to have the tribal moneys turned over to them so as to permit them to "gobble up"

the annuities due the tribe, and not the other members of their share, which requests were denied by the executive officers of the United States clearly would be no defense to these illegal payments. Neither would it furnish a justification for the lower court in allowing such credits, nor support of finding that the Seminole Nation got the benefit of this money. As a lower court pointed out in its former decision (82 C. Cls. 135, 149):

> "* * * Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority of offset against the plaintiff's claim." *

That the amounts due on this treaty obligation were turned over to the United States agent in the fiscal years 1907-1909, inclusive, under the authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137, would not relieve the United States of its treaty obligation, unless it is shown that said agent paid said amounts per capita for these years.

We submit that the former decision of the lower court is the correct one to be followed as to this item.

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided in part as follows:

> "The balance due the Seminole Nation after making said deductions, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest

* See footnote p. 20.

of which shall be paid annually and appropriated to the support of schools.*"

This item claimed by petitioner was limited to the allowance made by the lower court in the first proceeding. Although the amount of $2,500 was annually appropriated from 1867 to 1874, inclusive, yet $16,902.80 only was disbursed for this treaty purpose, leaving a balance of $3,097.20 due during this period. During the period 1875 to 1898 this annual payment was made to the Seminole tribal treasurer without authority of law and in violation of the treaty provision, and in 1907 the amount of $750.00 was paid to the United States Agent under authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137. The lower court in its decision of December 2, 1935 rendered judgment for the above amounts, in all $61,347.20, for the reason that such payments were not made in accordance with the treaty provision (82 C. Cls. 135, 151-152).

In its last decision the lower court permitted recovery of $3,097.20 only, even though said other amounts were not disbursed in accordance with the treaty, and notwithstanding the fact that such disbursements were not authorized by law. The reason given is that the tribal officials disbursed $7,500 annually for schools; this in the face of the record showing the wrongful manner in which the tribal officers were using the tribal funds. Clearly this reasoning of the lower court would not relieve the United States of disbursing this money for schools, in accordance with this treaty provision.

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*This statement is equally applicable to the situation before us, as the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities". The Conference Report on the above bill (H. Rept. No. 1715, 74th Cong., 1 Sess., p. 8) states the intent of Congress in making this exception as follows: "expenditures from tribal funds are not to be considered as gratuity expenditures."

The sole excuse for such illegal payments was given in the first proceeding, that of the Act of April 15, 1874, c. 97, 18 Stat. 29.[2] The Court therein pointed out in its decision that said Act of 1874 did not apply to Treaty of March 21, 1866 funds, but was expressly limited by its terms to Treaty of August 7, 1856 funds (82 C. Cls. 135, 151-152).

We submit that the lower court was correct in its first decision and that it was not justified in its second decision in disregarding this treaty provision, or Section 2097, with respect to these treaty disbursements. There is no showing that the United States disbursed this amount for schools and in the absence of such a showing we submit that the petitioner is entitled to recover on this item of its claim.

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

> "Inasmuch as there are no agency buildings upon the new Seminole reservation it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

By the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, Congress appropriated $10,000 to fulfill this treaty obligation, but this amount was returned to surplus. By Act of May

[2] This Act became effective on April 2, 1879 (R. 69).

18, 1872, c. 172, 17 Stat. 122, 132, Congress again appropriated $10,000 to fulfill this treaty obligation, $9,030.15 of which was disbursed for some other unknown purpose, and $969.85 was returned to surplus. In 1870 and 1872 an amount of $931.76 was expended from general appropriations for agency buildings and repairs (R. 15).

In its first decision of December 2, 1935, the lower court gave judgment for $9,068.24, which represented the difference between the $10,000 appropriated by Congress for this treaty purpose and the $931.76 disbursed from general appropriations for agency buildings and repairs (82 C. Cls. 135, 152-153). In its second decision the lower court denied recovery upon the assumption that an agency building was erected on the Seminole reservation in 1873, and cited the report of the Commissioner of Indian Affairs for 1873, pp. 211-212, as evidencing this fact. This report shows that some sort of agency building was in the process of *being* constructed, but there is no showing that this building was ever completed. The sole amount shown to have been spent for this treaty purpose was $931.76, and the United States is entitled to credit in this amount, as allowed in the first decision of the lower court. Clearly the disbursement of this $931.76 was not a substantial compliance with this treaty obligation, especially when Congress definitely fixed the amount of this obligation by twice appropriating $10,000 for this treaty purpose, and the record showed that the estimate for suitable agency buildings made by the United States Agent for the Seminoles exceeded the amount fixed by Congress for this treaty purpose (R. 60-61). Furthermore, the illegal disbursement of said $9,030.15 was not only a violation of the treaty, but also the act of Congress appropriating same, and as such would be a plain violation of Sec. 2097 of the Revised Statutes, *supra*.

We submit that the first decision of the lower court with respect to this item is the correct one to be followed herein.

Item 5.

This item of petitioner's claim is based upon the illegal disbursement of Seminole tribal funds in violation of Section 19 of the Curtis Act, approved by Congress June 28, 1898, c. 517, 30 Stat. 495.

The sole question involved in this item is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe, and whether the Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

The basic question was passed upon in *Creek Nation* v. *United States*, 78 C. Cls. 474, 485, in which the court stated:

> "That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation *v.* Georgia, 5 Pet. 1; Cherokee Nation *v.* Hitchcock, 187 U. S. 294; Lone Wolf *v.* Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Said Section 19 of the Curtis Act provides as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The purpose of this provision is clearly shown by a review of the events leading up to its passage. We will comment upon them briefly.

Before the Curtis Act the Seminole tribal officials were entrusted with the disbursement of certain of its tribal income, the payments of which were authorized to be made to the tribal treasurer under the Acts of April 15, 1874, c. 97, 18 Stat. 29, and March 2, 1889, c. 412, 25 Stat. 980, 1004.

As early as 1869 it was called to the attention of the executive officers of the United States that the Seminole officials were monopolizing the tribal income. The report of T. A. Baldwin, the United States Agent for the Seminoles, dated Dec. 6, 1869, stated in part as follows:

> "I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.
>
> "I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per 'capita'.
>
> "I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid unnecessary expenditure of money for Councils; etc. which are of but little benefit to the nation, (for example the last council held cost the nation $700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

On August 9, 1875, Special United States Commissioner John P. C. Shanks reported to the Commissioner of Indian Affairs that the Seminoles were in bad hands; that the

tribal officers create large claims against the nation in favor of themselves, procure a resolution of the council endorsing them and issue warrants in favor of themselves for payment from tribal funds (R. 62).

On November 20, 1878, A. B. Meacham, United States Indian Agent for the Seminoles, reported that the Seminole Chiefs were "gobbling" up the annuities due the tribe, and robbing the other destitute members of their just shares; and that "It is a perfect system of Bull-dozing the ignorant in order to live upon them" (R. 64).

In 1889 John F. Brown, Principal Chief of the Seminole Nation, and A. J. Brown, his brother, Seminole treasurer (the same officials who were in charge of Seminole affairs during the period of this claim—1898–1907), and Samuel J. Crawford, Ex-Governor of Kansas and an attorney, embezzled a large amount of money for lands sold under an agreement ratified by Act of March 2, 1889, c. 412, 25 Stat. 980, 1004. The amount was paid to the tribal treasurer, and it vanished from sight, and never reached the Seminoles (Sen. Doc. 105, 55 Cong., 2 Sess., pp. 3-4).

By Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the Dawes Commission was created for the purpose of negotiating with the Five Civilized Tribes for the allotment of their lands and the division of the funds equally among the members of said tribes. The annual reports of this Commission from 1894 to 1898 set forth the intolerable conditions existing within the tribal governments of the Five Civilized Tribes. The report, dated Nov. 20, 1894 (Repts. of Comm. to the F. C. T., pp. 68-70), states in part as follows:

> "Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at conceal-

ment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

* * * * * * *

"The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers.

* * * * * * *

"Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. * * *"

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 451-453, are set forth extracts from these and other reports showing the intolerable conditions existing within the governments of the Five Civilized Tribes, and of the great need of reform.

The manner in which Seminole tribal funds were being

disbursed by the Seminole officials had been called to the particular attention of Congress. In 1896, Congressman Flynn, of Oklahoma Territory, endeavored to put a stop to the methods used by Seminole officials in "gobbling up" Seminole annuities, by securing an amendment to the Indian Appropriation Act requiring this money to be disbursed by an officer designated by the Secretary of the Interior. We quote from the proceedings of the House for February 24, 1896 (Cong. Rec., 54th Cong., 1st Sess., p. 2070), as follows:

> "Mr. Flynn: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.
>
> "The amendment was read, as follows:
>
> "'Insert, in line 15, page 27, after the word 'dollars', the following:
>
> "'Provided, That the sums of money mentioned in this and the preceding paragraph shall be paid to said Indians by an officer designated by the Secretary of the Interior'.
>
> "Mr. Flynn: * * * The object of this amendment, briefly stated, is this: There are about 2,000 Seminole Indians. The chief is Governor Brown. The treasurer is Jackson Brown, his brother. There are but two stores in the Seminole Nation, both owned by the Browns. This money is paid to Jackson Brown, the treasurer, and the Indians never see a dollar of it, but the Browns issue to the Indians duebills, good for so much in goods at the Browns' stores. The Browns have absolute control not only over the property, but I may say over the lives of these Indians. The Indians must take Browns' duebills for the amount of money that the Government pays them in annuities. I think, in justice to the Indians, in fairness to them this money should be paid by an officer designated by the Department, which will insure the Indians, instead of the storekeeper, getting all the money."

In 1897 Congressman Flynn again commented upon the manner in which Seminole funds were being monopolized

by these Seminole tribal officials and on the floor of the House stated as follows (Cong. Rec., Vol. 29, Pt. 2, 54th Cong., 2 Sess., p. 1261):

> "Mr. Flynn: * * * If you want the Indians to obtain the money you appropriate for them, then you should see to it that the money is paid by an officer of the United States.
>
> "It [tribal money] has been sent to the treasurers of the various tribes. If any individual Indian 'coughed up' enough to the officers of the tribe, probably he would get all that was coming to him, or probably he would not.
>
> "This amendment is offered solely in the interest of the individual Indian. I am frank to acknowledge that it is against the monopoly now existing. As I stated when the amendment was offered and adopted last year, the governor of the Seminole tribe is named Brown, and the treasurer is his brother. They run the only stores in the Seminole Nation. When the money is paid from the Treasury of the United States to the treasurer of the Seminole Nation, the individual Indian never gets a single dollar, but is given a duebill, upon which he can obtain goods to a particular amount at Brown's store."

The Seminole Indians themselves protested to Congress the manner in which their tribal officials were using the Seminole tribal funds. In the protest of January, 1898 (Sen. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

> "The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. * * *
>
> * * * * * * *
>
> "We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and ac-

cording to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *"

Awakened by these reports to the urgent need of reforming the then existing evils prevailing in the Indian Territory, both the executive and legislative branches of the United States Government combined to accomplish one general scheme or purpose—that of ridding the Indian Territory of these corrupt practices within the tribal governments by transferring the administration of the tribal property from the tribal officials to the officers of the United States, in order to insure to all the members of these tribes an equal share of the tribal estate.

The Curtis Act and the succeeding agreements with the Five Civilized Tribes had for their purpose the creation of correct membership rolls of these tribes, the allotment of their lands in severalty, the sale of the surplus lands, the equalization of allotments, the per capita distribution of the remaining tribal funds, and the final winding up of the tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program Section 19 of the Curtis Act forbade payments of tribal moneys on any account whatever to the tribal officers for disbursement.

The Original Seminole Agreement, ratified by Act of Congress approved July 1, 1898, c. 542, 30 Stat. 567, provided generally for the enrollment of citizens and allotment of lands in severalty, the equalization of the value of allot-

ments, and the per capita payment of funds not used for said equalization of allotments, *to be paid by a person appointed by the Secretary of the Interior.*

Let us impress upon the Court that the Curtis Act and the agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time, and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the crooked tribal officials, and the transferring of the administration of the tribal property and funds from these corrupt tribal officials to the United States Government.

However, as soon as the Curtis Act and the Seminole Agreement became effective the Seminole tribal officials sought to avoid them, and again employed Samuel J. Crawford to represent them. These officials and their attorney raised the question as to whether or not Section 19 was repealed by the Seminole Agreement. The Secretary of the Interior submitted the question to the Assistant Attorney General for the Interior Department, Willis Van Devanter, later Mr. Justice Van Devanter of the United States Supreme Court, who held that (82 C. Cls. 135, 157-158):

> "I have therefore to advise that Section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Morever, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same."

The Seminole officials then had the Van Devanter opinion withdrawn and had the question transferred to the Comptroller of the Treasury for decision. The Comptroller held that Section 19 did not apply to the Seminole Nation. The fallacies of the reasoning in this opinion are pointed

out by the lower court in its decision of December 2, 1935, 82 C. Cls. 135, 157.

The Secretary disregarded the Van Devanter opinion and followed the Comptroller's opinion, and thereafter continued to turn Seminole tribal moneys over to the Seminole officials in violation of Section 19, until Attorney General Bonaparte put a stop to this manner of paying Seminole funds in an opinion involving the right of the Seminole officials to disburse Seminole funds under the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137. (See 26 Op. Attys Genl 340).

The Seminoles themselves wondered why their funds were not being disbursed by an officer of the United States. Their delegate wrote the Commissioner of Indian Affairs as follows (R. 64):

> "A few years ago through your efforts a Bill was passed by Congress making the Seminole Annuity payable by the U. S. Indian Agent. This gave great satisfaction to all the tribe except the official class who through the representation of the Governor (Brown) that their salaries would cease to be paid, opposed it by a petition of his get up. Then for some reason to us unknown this law was set aside and the annuity has been paid through his manipulation and entirely to his wish. * * * They, the tribe, of course would like some say in the disposition of the funds. Can you give us any information on the subject and have we any recourse to have the law executed?"

During the whole period of petitioner's claim (1898-1907), and for many years before, the affairs of the Seminole Nation were under the control and domination of two brothers, John F. Brown, Principal Chief, and A. J. Brown, Seminole Tribal Treasurer. These officials were intelligent half-breed Indians. The Browns and C. I. Long (a white man) owned and operated a business enterprise known as the

Wewoka Trading Company. By means of a credit system, worked out through this company, the Browns "gobbled up" all of these Seminole annuities. Of all the moneys appropriated by Congress for the Seminoles the Indians would never see a dollar of it. Several months before the annuities were due from the Government, the Browns would require the Seminoles to accept scrip in the amount of the per capita due, entitling each holder to credit at the Wewoka Trading Company. Before the Indian received this scrip the Browns deducted a big per cent for interest, or a discount (R. 65-67). When the money was paid by the United States to A. J. Brown, Seminole Treasurer, the Browns would rake it all over into the tills of the Wewoka Trading Company. The Indians were required to go to Brown's store to redeem the scrip in goods. In many instances, not knowing what the scrip represented, the Indians threw it away. In this manner the Browns kept the Seminoles perpetually in debt to them, and thus were able to secure to themselves the Seminole annuities (R. 65-67).

The Seminole Treasurer was administrator in a payment of moneys due the Loyal Seminoles made during the period of our claim. Special Assistant United States Attorney P. L. Soper, in objecting to the approval of A. J. Brown's account by the Court, recommended that Brown be required to repay amounts deducted from shares for the Wewoka Trading Company and Samuel J. Crawford for an illegal attorney fee (the same Crawford who was involved in the 1889 steal, and who fought for the Browns to avoid the application of Section 19 as to the Seminole funds).

Mr. Soper reported that A. J. Brown, Seminole Treasurer and Vice President of the Wewoka Trading Company, did not pay the amounts due the Seminoles in cash but acted as collector for said company, deducting from the shares amounts due said company and an illegal attorney fee, and

then reported that said amounts were paid in cash (R. 64-65). He further states (R. 65):

> "The testimony shows that books were issued and given to each claimant, containing a certain credit, upon which interest was charged from the beginning. Thus no record was ever kept of the nature, character and kind of goods, wares and merchandise each person obtained and the price paid for same. With adults this might not matter, but with minors it is of the utmost importance, especially taking into consideration the state of intelligence of the claimants, and especially the majority of those who testified before your Honor."

In commenting upon the above payment, Mr. Henry C. Lewis, an Investigator of the Department of Justice, expressed the view that the system of credit used by the Wewoka Trading Company was dishonest. When transmitting the report of Mr. Lewis to the Secretary of the Interior, the Acting Attorney General quotes from the report in part as follows (R. 65-66):

> "It may not be inappropriate to make one or two observations upon this system of credit. * * * To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to

turn in the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

In 1916, Wm. L. Bowie, Special Investigator of the Department of the Interior, reported that the Browns were using their official positions to "advance their personal interests at the expense of the Indians under their authority" (R. 68). This report states in part as follows (R. 67):

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand. As governor, he issued the tribal scrip, and, as Indian trader, he held this scrip, requiring the Indians to whom it was issued to endorse it over to him, in payment of merchandise accounts, or for goods to be purchased by them. In this way the Browns monopolized the Indian trade, and it is stated, that if it had not been for poor business judgment used by them in specu-

> lation and in bad business ventures, that they would be in splendid financial condition. * * * In recent years, they have been losing the Indian trade, and reliable persons have advised me that Governor Brown has been gradually losing the confidence of the members of his tribe."

The Interior Department officials called the Brown matter under investigation "the rawest graft deal" with which they had ever come in contact, and suggested that the only way to deal with "these tiger shore sharks" was to call for the resignation of the Browns (R. 68). This was done on September 22, 1916, and thus the curtain fell on Browns' activities (R. 69).

From this whole record it is evident that the so-called Seminole Government was of the Browns, by the Browns, and for the Browns, and the poor helpless Seminoles got little or nothing of the tribal annuities turned over to the Browns. It is a well known axiom that no man can serve two masters, and we have seen that the Browns, in their dual capacities as officials of the tribe and Indian traders, served but their own personal ends at the expense of the more ignorant and poorer members of the Seminole tribe.

In the first decision of the lower court judgment was rendered in favor of the Seminole Nation for $864,702.58 representing the Seminole tribal moneys turned over to the Seminole officials in violation of Section 19 of the Curtis Act. The court said (82 C. Cls. 135, 156-158):

> "The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all

members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer.

* * * * * * * *

"The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so."

In its last opinion the lower court held that Section 19 applied to the Seminole Nation; but limited its meaning to a prohibition against turning Seminole tribal moneys to the tribal officers for per capita payments only, and denied recovery on this item of petitioner's claim. The lower court said (R. 29):

"Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word 'but' in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe."

The Court further states (R. 29) that the meaning of the first clause of the paragraph "is modified by the following one."

Let us analyze the grammar of this section to determine whether or not this is correct. The first clause expresses an

entirely different thought from the second clause, and reads as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The second clause expresses another independent thought, and reads as follows:

> "* * * payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him;"

These two independent thoughts are joined by the word "but", appearing in the second clause before the word "payments." In "Advanced English Grammar," by Kittredge and Farley (Ginn & Co.), p. 152, the word "but" is given as one of the chief coordinate conjuctions; and at p. 151, *supra*, it is stated:

> "A coordinate conjunction connects words or groups of words that are independent of each other."

Given two independent clauses, one could not modify the other; and, the coordinate conjunction "but" being used by Congress to connect these two independent clauses, the first clause could not modify the second clause. Therefore, Congress clearly intended that the first clause stand alone and prohibit all payments of any tribal moneys on any account whatever to the tribal officers for disbursement; and that the second clause direct that all disbursement of tribal moneys be made by the United States or an officer thereof; and that the third clause provide that per capita payments be made directly to each individual member of the tribe, without becoming liable for any previously contracted obligation.

In holding that Section 19 applied to Creek funds, Assistant Comptroller Mitchell, in his decision of August 30, 1898, 5 Comp. Dec. 93, 96, stated:

> "There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19 of the act of June 28, 1898, supra. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States the prohibition found in the first three lines was unnecessary. * * *"

It is impossible to reconcile the lower court's last holding with the history of this legislation, as heretofore outlined. The whole purpose of the first clause of Section 19 was clearly, and we think correctly, set forth in the lower court's former opinion from which we have quoted, *supra*, pp. 35-36.

Furthermore, the manner of disbursing Seminole tribal moneys under Section 19 and under the Seminole Agreement, approved by Act of July 1, 1898, c. 542, 30 Stat. 567, was the same, as pointed out in the court's former opinion (82 C. Cls. 135, 157).

The claim under consideration does not involve a payment to the tribe a second time, but the proper payment of this money a first time. Under Section 19 the Seminole tribal officers could not represent the tribe in the receipt and disbursement of the tribal funds. By failing to follow the plain directions of Congress, the Secretary of the Interior paid the wrong parties and the United States is now liable to the rightful owner of said funds. In *Burnell* v. *United States*, 44 C. Cls. 535, 548, the court stated:

> "Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust

fund applies to the government as well as to an individual trustee. (Borcherlin's Case, 35 C. Cls. R. 312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

The lower court in its last opinion (R. 30) states:

> "But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. The Sac and Fox Indians, supra."

This statement of the lower court overlooks the fact that the Seminole Nation, and not individuals, is party plaintiff in this suit, and that the tribe is suing for annuities due the tribe which were paid to the wrong parties. The *Sac* and *Fox* case, 220 U. S. 481, cited in support of this statement has no application to the question now before us. In that case no question of a deliberate disregard of an Act of Congress by the Secretary of the Interior was involved, but this Court held that the Secretary had implicitly complied with the directions of Congress in paying the tribe its tribal annuities.

A careful analysis of the decision of this Court in the *Sac* and *Fox* case shows clearly that a *small band of individuals who had severed their connections with the tribe* sued the tribe for a part of the tribal annuities claimed to be

due said band, contending that the Secretary of the Interior had not followed the directions of Congress enacted for its benefit. This Court simply held that a direction to the disbursing officers of the United States providing how *tribal* annuities should be paid to the *tribe* would not give said band of individuals a vested right in tribal *annuities;* that the tribe, and not said band of individuals—who were not members of the tribe—had a vested right in tribal annuities; and also that the Secretary of the Interior had followed the directions of Congress in disbursing the tribal annuities.

In the case at bar the tribe is suing the United States for annuities due it by virtue of its treaties and agreements with defendant, which annuities were not paid to the *tribe* because of the failure of the Secretary of the Interior to follow the plain directions of Congress providing the manner of the payment of same to the tribe, and enacted expressly for the purpose of insuring to the tribe the benefit of its tribal annuities. Both decisions of the lower court hold that Section 19 was violated. However, in its later decision denying recovery for this violation, the lower court overlooks the principle that Congress has plenary power over the affairs of an Indian tribe.

The main question before the court is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe. In *The Creek Nation* v. *United States*, 78 C. Cls. 474, 491, the court in passing upon this question stated:

> " * * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe. * * * Such

payments were not only made without authority of law but were made in contravention of positive provisions of law. * * *"

For the reasons stated above, we submit that the lower court was correct in its decision of December 2, 1935, 82 C. Cls. 135, wherein it held that Section 19 of the Curtis Act prohibited payments of all tribal moneys to the tribal officers "on any account whatever" for disbursement; that the manner of disbursement of tribal moneys under Section 19 and under the Seminole Agreement was the same; that Congress, and not the Secretary of the Interior, has plenary power over Indian Affairs; and that the United States is liable to the Seminole Nation for the failure of the Secretary to follow the plain directions of Congress as to the disbursement of Seminole tribal funds to the tribe.

Gratuity Offsets Allowed by Lower Court.

The questions on this phase of the case are novel, and have never been passed upon by the Court.

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provided in part as follows:

"Sec. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * Provided, That expenditures made prior to the date of the law, treaty, agreement or Executive order under which the claims arise shall not be offset against the claims or claim asserted: * * * Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *"

Without proof or argument in support of its purported gratuity offsets the United States claimed the amounts disbursed for the items set forth in the lower court's Findings 11-18, inclusive (R. 17-20). Clearly, the United States is required to prove affirmatively that the amounts claimed as gratuity offsets were disbursed gratuitously and for the benefit of the petitioner, before such items are to be held to be gratuity offsets under said Act of August 12, 1935.

The findings set forth disbursements made during the periods as follows (R. 17-20):

Findings XI, XIV, period from the fiscal years 1857-1866;
Findings XII, XV, XVIII, from the fiscal years 1867-1898;
Findings XIII, XVI, XIX, from the fiscal years 1899-1934.

The lower court, without requiring proof or argument of the United States, allowed most of the items listed in these findings.

In Findings XI, XII, XIV, XV, and XVIII, covering the period from 1857-1898, the amounts shown to have been disbursed either directly for petitioner or jointly with the other Five Civilized Tribes, were disbursed chiefly for administrative expenses of United States incurred in fulfilling its treaty obligations with the petitioner.

The purposes for which the amounts were disbursed are listed as follows: Agency buildings and repairs; Fuel, light and water; Miscellaneous Agency expenses; Pay of Indian Agents; Pay of Interpreters; Transportation, etc., of supplies; Pay of miscellaneous employees; Annuity expenses; General Office expense; Hardware, glass, oil and paints; Pay and expenses of Indian Police; and Pay for skilled employees.

As the lower court pointed out in its decision of January 6, 1941, petitioner, the plaintiff below, contended that all of the above expenses were incurred by the United States in

fulfilling its treaty obligations with petitioner (R. 34). Let us outline briefly the treaty provisions under which these obligations of the United States arose.

The United States assumed the following obligations under the Treaty of August 7, 1856, 11 Stat. 699: to pay the Seminoles west certain sums; to pay interest on funds established therein which was directed to be distributed per capita annually by the United States (Article 8); to remove the Seminoles in Florida to the west and provide them with rations and subsistence during their removal and for 12 months thereafter, and to distribute among them clothing, etc. (Art. 9); to pay delegations of Seminoles to Florida to induce those east to remove west (Art. 10); to erect agency buildings and a council house (Art. 12); to remove intruders from their domain (Art. 15); to issue licenses to such persons as were authorized to trade within the domain (Art. 17); to protect them from domestic strife, hostile invasion, and from aggression from other Indians and whites (Art. 18); and to survey the boundaries of the reservation (Art. 21).

Other like obligations were assumed by the United States under the Treaty of March 21, 1866, 14 Stat. 755.

Thus it is evident that it would have been impossible for the United States to fulfill its treaty obligations with petitioner unless these disbursements were made. The United States was required to furnish an agent to carry out its obligations under these treaties, and to pay the annual annuities due the tribe. This service was promised the Seminoles for a given consideration on their part, and the Government was required to disburse this money to fulfill these treaty duties. Therefore, the amounts thus disbursed clearly would not be gratuity offsets, but would be disbursements of the United States made incidental to the carrying out of its treaty obligations with plaintiff.

We will comment upon one of these treaty obligations owing to petitioner. Article 15 of the Treaty of August 7, 1856, provided in part as follows:

> "* * * all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz.: such individuals with their families as may be in the employment of the Government of the United States;" etc.

Article 1 of the Treaty of March 21, 1866, 14 Stat. 755, provides:

> "* * * In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; * * * Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States."

Thus, in one treaty the United States assumed an obligation that its agent would remove all intruders within the limits of the Seminole country, and in the other treaty the United States guaranteed to the Seminoles quiet possession of their country.

There was ample reason for these provisions. The Five Civilized Tribes had been driven from their homes east of the Mississippi by the inroads of the whites. The United States had removed them to lands west of the Mississippi and had agreed to isolate them from the white men. However, with the development of our country westward the white men settled the surrounding states and territories, and soon began again to intrude upon their western domains (1869 Rept. Comr. Ind. Aff., p. 418).

In 1876 the United States Indian Agent wrote the Commissioner of Indian Affairs as follows (1876 Rept. Comr. Ind. Aff., p. 63):

> "Another great source of continued disturbance is the large number of unauthorized and irresponsible white intruders in the Territory. Vigorous measures ought at once to be adopted to carry into effect those treaty stipulations which guarantee to keep these nations free from persons not duly authorized by law to reside therein. Their number is constantly on the increase; in one county alone in the Chickasaw Nation it is estimated there are three thousand."

The duties of the United States Indian Agent for the Five Civilized Tribes agency, were outlined in his report to the Commissioner of Indian Affairs (1877 Rept. Comr. Ind. Aff., p. 107), as follows:

> "My work has not been to protect these tribes from cold and hunger by furnishing them with clothing and food—these are not supplied by the United States Government—as much as it has been to protect them in their treaty rights, against the impositions and craftiness of dishonest white men. I would not intimate by this remark that there are no real good and honest white men among these tribes. There are very many, but those who are unscrupulous, selfish, unprincipled and indolent far outnumber them. And while the good and honest white people living here are slow to speak and act against the sins of the country, the latter are bold and reckless in their deeds of corruption; in fact, they control, to a large extent, the political and financial interests of the tribes; and the crimes charged upon the Indians in too many cases may be traced either directly to the influence or acts of corrupt, designing white men * * *"

(See also 1879 Rept. Comr. Ind. Aff., p. XLIV; 1881, Ibid., p. 104).

In carrying out this treaty obligation—to remove intruders—an Indian Police force was organized, and used for this purpose (1883 Rept. Comr. Ind. Aff., p. 87). The United States Agent reported (1889 Rept. Comr. Ind. Aff., p. 240):

> "Since I have been in charge of the agency the police have served effectively in removing intruders, suppressing crime, preserving peace, arresting criminals, guarding Government funds, and in many ways performing arduous and ofttimes dangerous duties * * *."

In 1885, United States Agent, Robert L. Owen (who later became U. S. Senator), reported (1885 Rept. Comr. Ind. Aff., p. 107):

> "The United States agent is kept busy trying to determine who are intruders, of the great number reported to the agency as such; then putting them out the limits of the agency; and, lastly, keeping them out with a United States Indian police force. * * *. The United States is available for this purpose, but it is like using a sledge-hammer to fan away the flies with—strong enough to crush the fly, but not nicely adjusted to the business."

Thus we have outlined the duties of the United States Agent and it is evident that his efforts were chiefly confined to directing the work of protecting these tribes from white intruders, and attempting to remove them in fulfillment of the Government's treaty obligations with these tribes.

In denying the petitioner's conteption—that these disbursements were treaty disbursements of the United States, and not gratuity offsets—the lower Court stated (R. 34):

> "However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of Blackfeet, et al.

> Tribes v. United States, 81 Ct. Cls. 101, 137, and Shoshone Tribe v. United States, 82 Ct. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets."

An examination of these cases shows that they have no application to the question now before us. These cases involved what is known as the "Wild Tribes", the treaties with which are separate and distinct from those of the Five Civilized Tribes. The question before the court in these cases was whether the administrative expenses were beneficial to the Indians, not whether these disbursements were incurred in the performance of the treaty obligations of United States owing to the tribe. In the *Blackfeet* case, 81 C. Cls. 101, 137, the court said:

> "It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed they did, to what extent. They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs. They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover."

The court in the *Shoshone* case, 82 C. Cls. 23, 93, merely quoted with approval the above language in the Blackfeet case.

In the case at bar the question is not one of benefit; but the question is whether the United States was required to maintain said agency in order that the duties and obligations assumed by it under the Treaties of 1856 and 1866 could be fulfilled. Clearly said administrative expenses,

as to the Seminole Nation, were incurred by the United States in fulfilling these treaty obligations, and would not be gratuity offsets against petitioner. Nevertheless the lower court charged said expenses to the petitioner.

We submit that the lower court erred in this holding, and we request this court to correct the error.

The item of "General office expense" was made from the appropriation "Commission, Five Civilized Tribes" (R. 71), and covers the expense of the Dawes Commission, created by Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Five Civilized Tribes for the extinguishment of their tribal governments and the allotment of their lands in severalty, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Under the then existing treaties with these tribes, they had been guaranteed the right of self-government, and the United States stipulated that, before a State or territory could properly be created out of their national domains, the consent of these tribes must be obtained (Creek and Seminole treaty of August 7, 1856, Art. 4, 11. Stat. 699). As we have seen, the United States was utterly unable to fulfill the obligations it undertook to remove white intruders, and to carry out its policy of isolating these tribes (Rept. of Dawes Comm., dated Nov. 20, 1894, Repts. Comm. F. C. T., p. 57). With the Indian country overrun with white intruders, the United States abandoned its policy of isolating these Five Civilized Tribes, and created the Dawes Commission to negotiate with them to free the United States from the requirements of its treaties with these tribes, which it found itself unable to perform; and to secure agreements with the tribes authorizing a transformation from the tribal estate held in common, to individual estates with title in the individual Indians, and with the ultimate end in view of incorporating this Territory into

a new State of the Union—a purpose clearly beneficial to the United States.

These negotiations were carried on by the Dawes Commission over a period of years during which time the Five Civilized Tribes refused to consider the proposed change. The item "General Office Expense" covers the expense of the Dawes Commission during the period of these negotiations. Clearly this expense is not chargeable to the Five Civilized Tribes, who vigorously opposed this change, and, only after the coercive provisions of the Curtis Act, were they subdued and forced to accept the Government's proposals.

Therefore, this item of expense was incurred by the United States in securing the release from its former treaty obligations with these tribes, and in furthering its change of policy toward them. We submit that the lower court erred in charging this item as a gratuity offset against petitioner.

PERIOD FROM 1899 TO 1934.

The lower court erred in charging the Seminole Nation with gratuity offsets of amounts disbursed by the United States in fulfilling its obligations under the Seminole agreements, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, and by Act of June 2, 1900, c. 610, 31 Stat. 250.

During the negotiations with the Seminole Nation for the Seminole Agreement, the Dawes Commission, on behalf of the United States, made certain proposals to the Seminoles upon which the agreement should be made. These proposals generally were that United States divide the lands of the Seminole Nation among its citizens, so as provide sufficient land for a home for each citizen to be inalienable for 25 years, or longer; that United States agree to put each allottee in possession of his allotment without expense to

him, and remove all intruders thereon; all invested funds, not devoted to school purposes, and other moneys, to be divided per capita among the citizens and paid by an officer of the United States (Rept. of Nov. 20, 1894, Comm. to F. C. T., pp. 64-65).

The Original Seminole Agreement as finally executed provided generally that the United States appraise and classify the Seminole lands, and divide and allot them equally among the members of the tribe, under direction and supervision of the Dawes Commission; that leases of mineral lands be approved by the Secretary of the Interior; that the United States take over and administer the Seminole school fund; that the homesteads of allottees be inalienable in perpetuity; that all Seminole moneys, after equalizing allotments, except the school fund, shall be paid per capita by an officer of the United States appointed by the Secretary of the Interior.

The Supplemental Seminole Agreement, approved by Act of June 2, 1900, c. 610, 31 Stat. 250, provided for the making of rolls upon which the distribution of Seminole property should be made; and provided for the manner in which the lands and funds belonging to allottees should descend to heirs upon the death of the allottees.

Thus in consideration of the Seminoles agreeing to give up their former mode of life and to give up their tribal holdings and to adopt the ways of the white man, the United States agreed to divide their tribal estate among the members of the tribe, and to perform the other obligations outlined in these Agreements.

The lower court, in holding that the petitioner was chargeable with the expenses incurred by the United States in carrying out its agreement obligations with petitioner, stated (R. 36):

> "There was no express provision in the Seminole agreement that the United States should bear the ex

pense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. Choctaw Nation *v.* United States, 91 Ct. Cls. 320."

Although no express provision is contained in the Seminole Agreement requiring the United States to bear the expense of the distribution of the Seminole tribal estate, yet a reference to the above mentioned "Proposals to the Seminoles" made by the Dawes Commission to induce them to execute the agreement shows what obligations the United States would assume should said agreement be made. In consideration of the Seminoles' agreeing to give up their tribal holdings in lands, money, etc., the United States agreed to divide this tribal estate among the members of the tribe in accordance with the terms of said agreement.

We submit that the lower court should have applied the well settled rule set forth in 6 Ruling Case Law, p. 856, as follows:

> "One who undertakes to accomplish a certain result agrees by implication to supply all the means necessary thereto. He is bound by implication to do everything necessary to enable him to perform his contract. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. In fact, it may be said that contracts impose on parties, not merely obligations expressed in them, but everything which, by law, equity, and custom, is considered incidental to the particular contract, or necessary to carry it into effect. * * *"

See also Vol. 3, *Williston on Contracts*, Sec. 1293; *Hall v. Luckman*, 107 N. W. 932, 933; *John O'Brien Lumber Co. v. Wilkinson*, 94 N. W. 337, 338.

In the American Law Institute Restatement of the Law on Contracts, Sec. 230, p. 310, it is stated:

> "The standard of interpretation of an integration, except where it products an ambiguous result, or is

> excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

Under the circumstances surrounding the execution of these agreements with the Five Civilized Tribes, and in view of the propositions made to them by the Daws Commission as to the obligations that the United States would assume under them, would it not be unreasonable to say that the United States would be excused from allotting the lands and dividing these estates because of the failure of these tribes to bear this expense? Would it be reasonable to assume that these tribes would have executed these agreements if they had understood that they would be required to pay this expense?

It has been the understanding of all branches of the Government that, under these agreements with the Five Civilized Tribes, the United States was to bear the expense of the administration of these estates and the division of them into individual holdings; and that as long as the individual Indians were restricted these agreements require the United States to protect them in their individual holdings. In harmony with this universal understanding is the statement contained in the General Accounting Office Report, which is as follows (R. 70):

> "Pursuant to the aforesaid act (March 3, 1893), commissioners were appointed, who entered into separate agreements with the aforesaid nations of Indians, including the Seminole Nation. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of lands in severalty; the survey, appraisement, and sale of

certain lands; the survey and sale of town sites; and the leasing of certain mineral and oil lands. In carrying out said projects, there were also considerable expenses incurred by the United States in the removal of restrictions upon the alienation of lands of certain allottees; the investigation of leases fraudulently obtained; and other expenses, including the pay of commissioners, superintendents, inspectors, attorneys, and miscellaneous employees."

A mere glance of Findings 13 and 18 of the lower court (R. 17, 19) shows that most of the items set forth therein and charged to petitioner under the opinion of the lower court are expenses incurred by the United States in carrying out its agreement obligations to the Seminole Nation and the other Five Civilized Tribes.

In discussing the policy of the United States in affording to these tribes the necessary protection under the terms of the agreements made with them, this Court, in Heckman v. United States, 224 U. S. 413, 432-433, 437-438, stated:

"But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligations, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees, through suitable restrictions which were designed to secure them in their possession and to prevent their exploitation.

. . . . . .

"During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review if its dealings with the tribe

permits no other conclusion. Out of its peculiar relation with these dependent people sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this Court whenever the question has arisen.' (United States vs. Kagama, 118 U. S., 375, 384)."

Clearly the cost of carrying out the obligations of the United States assumed by it under the Seminole Agreements and the other Five Civilized Tribes, is to be borne by the United States.

Many of the items set forth in Finding 18, and allowed by the lower court as gratuity offsets, could not possibly be charges against the Seminole Nation, unless the United States can show affirmatively that they were a gratuity and further that they were beneficial to said tribe. For instance, the Seminole Nation had just one townsite which was disposed of under the terms of the Seminole agreement by the tribal officials, at no expense to the United States. Yet the Seminole Nation is charged with "Sale of town lots" and "Sale of town sites" (R. 20).

Although the item "Probate Expense" was disbursed for the benefit of individual restricted Indians having private estates under the control and supervision of the United States, in which the tribe had no interest, the title of the tribe having been extinguished by patent issued under the terms of the Seminole agreement, yet the Seminole Nation is charged with a part of this expense (R. 20).

Although within the Seminole Nation there was no coal or asphalt, yet it is charged with a part of "surveying segregated coal and asphalt lands", etc., and other expenses properly chargeable solely to the Choctaw and Chickasaw Nations (R. 20).

Although the amount of $1,693,525.90 of the item "Education" was disbursed for the maintenance of the Cherokee Orphans Training School, at Tahlaquah, Cherokee Nation (R. 52-60), located miles away from the Seminole Nation, yet the Seminole Nation is charged 3.72 per cent of said amount, or $62,999.16, notwithstanding the fact that the attendance records show that not a Seminole Indian was in attendance at this school (R. 72), and that the Seminole Nation maintained with tribal funds its own school for the education of its orphan children (R. 72).

Although the lower court found that from 1908 to 1928 the Seminole Nation composed approximately 3.08 per cent of the total population of the Five Civilized Tribes, as shown by the final rolls compiled by the Dawes Commission during the period from 1898 to 1907, yet the lower court charged the Seminole Nation 3.72 per cent, or .64 per cent too much of the total shown by said Finding 18 (R. 20).

Should this case come before the court on the merits we desire also to have it review the item of gratuity offset of $165,847.17, paid by United States to correct its own error in erroneously moving the Seminoles on Creek lands, and promising to protect them in their improvements should the later surveys determine that said Seminoles had been located on Creek lands (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., pp. 4-7; R. 72-74).

We believe that we have amply demonstrated to the court the unfairness of the allowances made by the lower court in the gratuity offset phase of this case, and regret that the character and extent of these items would not permit us to analize them in more detail.

We submit that the lower court erred in failing to require of defendant affirmative proof of the fact as to whether or not said items were a gratuity and also whether they benefited the Seminole Nation, before permitting a gratuity offset for them under said Act of August 12, 1935.

Conclusion.

For the reasons set forth above the petitioner believes that the lower court has failed to give due consideration to the treaties and statutes governing the rights of the parties in this proceeding, and therefore earnestly requests that this Honorable Court grant a writ of certiorari in this case.

Respectfully submitted,

PAUL M. NIEBELL,
W. W. PRYOR,
Attorneys for Petitioner.

C. MAURICE WEIDEMEYER,
Of Counsel.